**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO.3744 OF 2005**
**IN**
**NOTICE OF MOTION NO.1395 OF 2002**
**IN**
**INCOME TAX APPEAL(LOD.) NO.436 OF OF 2002**

The Commissioner of Income-tax ..Appellant.

V/s.

M/s.Marwar Textiles (Agency) Ltd. ..Respondent.

Mr.Bhatt for appellant.

Mr.S.J.Mehta for respondent.

**CORAM : H.L.GOKHALE AND**
**J.P.DEVADHAR, JJ.**

**DATED : 28TH NOVEMBER, 2006.**

**P.C. :-**

Heard Mr.Bhatt in support of this Motion. Mr.Mehta appears for the respondent. Motion seeks to recall the order dated 12th February, 2004 passed by the Division Bench to which one of us (J.P.Devadhar,J.) was a party. That order directed the appellant herein to file better affidavit to explain the delay in filing the appeal. The affidavit was to be filed by 1st March, 2004. The affidavit in support of the present motion states that the affidavit was ready and it could been filed only on 3rd March, 2004 and since the affidavit was not filed in time the notice of motion No.1395 of 2002 and the Income Tax Appeal (Lod.) No.436 of 2002 stood dismissed. This Motion, therefore, seeks the order to recall that order and the matters to be restored.

2. Mr.Mehta appears for the respondent and has submitted that there is a complete carelessness on the part of the appellant in the matter of prosecuting their proceedings and that the respondent should not be made to suffer on that count.

3. We have noted this objection of Mr.Mehta. However, what we find is that whereas this Motion is arising out of the assessment year 1997-98, in an earlier assessment year 1995-96 an order has been passed by the Tribunal in favour of the revenue and an appeal preferred by the respondent bearing Income Tax Appeal No.509 of 2001 has been admitted and is pending in this Court. The question of law raised is common. In view of this position, from the point of view of consistency, we are required to accept this Motion. There was a delay of 2 days in filing the affidavit which has been directed to be filed. We condone the delay. As a result thereof, the position will be that the affidavit will be taken on record and consequently the dismissal of the Motion and the appeal will stand recalled.

4. We award a costs of Rs.1,500/- to the respondent for this Motion.

5. Motion allowed with the costs as above. Cost to be paid within 2 weeks.

**(H.L.GOKHALE, J.)**

**(J.P.DEVADHAR, J.)**